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No. 82-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARION DALE FLEWALLEN,
Petitioner,

vs.

GORDON FAULKNER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana

DAVID A. ARTHUR
Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6332

Attorneys for Respondent

Central Publishing Company, Inc., Indianapolis, IN 46204

QUESTION PRESENTED FOR REVIEW

Whether the Petitioner was denied his Sixth and Fourteenth Amendment rights to confront and effectively cross examine the witnesses against him.

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Respondent, Gordon Faulkner, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereinafter "Seventh Circuit"), thereby refusing to review the decision entered by that Court in Cause Number 81-2323 on May 10, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 677 F.2d 610. It also is reported in the appendix to the Petition for Writ of Certiorari (hereinafter "Petition").

The opinion of the United States District Court for the Southern District of Indiana (hereinafter "District Court") is an unpublished opinion and appears in the appendix of the Petition.

The opinion of the Indiana Supreme Court is reported at 289 Ind. 70, 338 N.E.2d 239. It is also reprinted in the appendix to the Petition.

STATEMENT OF THE CASE

A.

NATURE OF THE CASE

This Petition arises from a decision of the Seventh Circuit, affirming an order of the District Court that denied Petitioner relief in an action filed by him under 28 U.S.C. §2241 *et seq.*

B.

COURSE OF THE PROCEEDINGS BELOW

Respondent accepts the portion of the Petitioner's Statement of the Case, contained in the Petition for Writ of Certiorari, which deals with the prior proceedings in the federal courts.

STATEMENT OF THE FACTS

Respondent accepts the portion of the Petitioner's Statement of the Case, contained in the Petition for Writ of Certiorari, which deals with the facts of the case.

REASONS FOR DISALLOWANCE OF THE WRIT

At Flewallen's criminal trial the prosecutor was permitted to admit into evidence and to read from transcripts of out of court statements of six prosecution witnesses. Flewallen was permitted to object to particular questions and answers and if the objection was sustained the jury did not hear the objectionable portions. Flewallen also fully cross-examined all six of the witnesses. The sole issue presented for review by this Court is whether or not Flewallen was afforded his Sixth and Fourteenth Amendment rights to confront his accusors.

As Flewallen states in his brief, the leading case dealing with the rights to confrontation in these circumstances is *California v. Green*, 399 U.S. 144 (1970). In *Green* this Court concluded, after reviewing *Mattox v. United States*, 156 U.S. 237 (1895), that "(v)iewed historically...there is good reason to conclude that the confrontation clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *California v. Green, supra*, at 159. This Court further stated that:

> This conclusion is supported by comparing the purposes of confrontation with the alleged dangers in admitting an out-of-court statement. Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.
>
> (*California v. Green, supra*, at 159).

The out-of-court statements may have been made under circumstances subject to none of the enumerated protections. However, "if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes retains most of the lost protections." *Id*, at 159.

> As far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury...
>
> * * *
>
> Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured a full and effective cross-examination at the time of trial.
>
> (*California v. Green, supra*, at 159-160).

Reviewing the three purposes for the confrontation clause enumerated in *Green* in light of the facts in this case it is apparent that the United States Court of Appeals for the Seventh Circuit correctly decided that the procedure followed by the state trial court did not violate Flewallen's Sixth and Fourteenth Amendment rights. For example, in this case each declarant was present and testified at trial, was under oath at that time, was subject to cross-examination, and jurors could observe the demeanor of the witness.

Flewallen attempts to distinguish this case from *Green* by asserting that, in *Green*, "the confrontation requirements of oath and demeanor were satisfied by the State's witness' subjection to a formal oath at the time he made his challenged statement..." (petition at p. 14). However, in *Green* this Court specifically stated that where, as in the instant case, the declarant must, at trial, "affirm, deny, or qualify the truth of the prior statement under the penalty of perjury" *California v. Green, supra*, at 160, then the oath requirements of the confrontation clause have been met.

Flewallen further seeks to distinguish this cause from *Green* on the basis that the statements in *Green* were given "during a formal preliminary hearing made under oath in circumstances which closely approximated those of the typical trial." (Petition at page 15). However, read in context it is clear that although this Court did address this question it did so as an alternative theory and did not rely on it as the basis for its decision. It is clear from examining the language cited by Flewallen in context that this Court had already determined that the procedure followed in *Green* was constitutionally adequate whether or not the statements had originally been made under circumstances approximating a trial. *Green v. California, supra,* at 165-166.

Flewallen also seeks to distinguish this case from *Green* on the question of whether there was sufficient opportunity for cross-examination and whether the jury was able to observe the demeanor of the witnesses. There is no doubt that Flewallen had a full and fair opportunity to cross-examine each of the six witnesses at trial "...Flewallen does not cite even a single instance in which this unorthodox procedure hampered his ability to cross-examine the declarants." *Flewallen v. Faulkner,* 677 F.2d 610 at 612.[1] However, as this Court established in *California v. Green,* "...the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance *as long as the defendant is assured of a full and effective cross-examination at the time of trial." California v. Green, supra,* at 160 (emphasis added).

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[1]Indeed, the Court of Appeals correctly noted that in some respects, "use of the challenged procedure may have benefited Flewallen...because the questions and answers were subjected to a 'preclearance' procedure, the jury never was exposed to (objectionable questions and answers)" *Flewallen v. Faulkner,* 667 F.2d at 612.

Neither does the fact that the jury was unable to observe the demeanor of the witnesses at the time they made their original statements violate the Sixth Amendment. The jurors in this case were able to observe the demeanor of these witnesses at trial which is all that was available in *Green*. The jury may observe and evaluate the witness' demeanor as he disavows, qualifies or affirms his previous statement. Flewallen complains that in this case he could only observe witnesses "who claimed to have forgotten most of their previous statements" (Petition at p. 14). However, even if we accept this as an accurate statement of the facts, it would also apply to *Green*. In that case the witness Porter's statement was used by the prosecution precisely for the reason that Porter was evasive and claimed he was uncertain how he had obtained the drugs and that he was unable to remember the events that followed his telephone conversation with the defendant.

The Seventh Circuit was correct in determining, in light of the facts, that Flewallen's Sixth Amendment rights were not abridged. The Seventh Circuit ruling in this case is in no way inconsistent with this Court's holding in *California v. Green* and there is no reason for this Court to grant a writ of certiorari in this case.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

DAVID A. ARTHUR
Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6332

Attorneys for Respondent